IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1960

No. 219

CARL SCHNELL and THE GRIFFITH LABORATORIES, INC.,
Petitioners,

vs.

PETER ECKRICH AND SONS, INC.,
and
THE ALLBRIGHT-NELL COMPANY,
Respondents.

RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR CERTIORARI

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OPINIONS BELOW

The opinions below are properly identified in the Petition (p. 1).

JURISDICTION

Petitioners' statement of jurisdiction (p. 2) correctly refers to 28 U.S.C. Section 1254 (1).

* While the Petition names two respondents, it involves a procedural question the determination of which can only affect The Allbright-Nell Company. This brief will, therefore, use the term "Respondent" only with reference to The Allbright-Nell Company and will refer to the other named respondent, Peter Eckrich and Sons, Inc., as the Defendant.

QUESTION PRESENTED

Did the assumption of the defense of Peter Eckrich and Sons, Inc. by The Allbright-Nell Company as a matter of law constitute a submission to the jurisdiction of the District Court or a waiver of any objections to service of summons and venue by The Allbright-Nell Company?

Respondent's wording of the question presented is preferable to that found in the Petition (p. 2) because it corresponds to the conclusion of law entered in the District Court (App. pp. 6, 14) and certified for immediate appeal under 28 U.S.C. 1292(b).

The above phrasing of the question presented differs from that suggested by Petitioners by articulating that The Allbright-Nell Company cannot be regarded as a formal party to the Indiana Actions (Nos. 1128 and 1184), unless its objections to venue as well as personal jurisdiction are overcome. Furthermore, Respondent's version of the question presented avoids the confusing emphasis which Petitioners have placed on events occurring after The Allbright-Nell Company had been named as a defendant in the complaints.

STATEMENT OF THE CASE

Petitioners' statement of the case (App. pp. 2, 3 and 4) is essentially accurate. It should, however, be observed that neither the Findings of Fact (App. pp. 3-5, 11-13) nor the record before this Court support the allegation of conspiracy between The Allbright-Nell Company and Peter Eckrich and Sons, Inc. referred to on pages 2 and 3 of the Petition.

ARGUMENT

Petitioners' Reasons for Granting The Writ are Inadequate

Petitioners seek to invoke this Court's jurisdiction for three separate reasons of which only the second one deserves more than cursory comment.

REASON No. 1

Petitioners first urge this Court to exercise its certiorari jurisdiction because there is presented an important question of federal law which has not been, but should be, settled by this Court. While Petitioners present no argument in support of this alleged reason for certiorari, it is clear that the basic issue here presented has been adjudicated in *G. & C. Merriam Company* v. *Arthur J. Saalfield et al.*, 241 U.S. 22, 36 S. Ct. 477 (1916). The case establishes that "it is inconsistent with elementary principles" to treat as an actual party to the record one who is not subject to venue and personal jurisdiction but has controlled the defense of a case pursuant to an agreement with a defendant who has been properly served and cannot object to venue.

REASON No. 2

There is no conflict between the Seventh and the Sixth Circuits which calls for resolution by this Court. It has long been recognized that mere differences in reasoning, emphasis or approach to legal questions may exist between the Courts of Appeals without requiring the intervention of this Court. Thus, it was said in *Layne & Bowler Corporation* v. *Western Well Works, Inc., et al.*, 261 U.S. 387, 393, 43 S. Ct. 422, 423 (1923) that the writ of certiorari should not be granted

> "* * * except in cases involving principles the settlement of which is of importance to the public, as distinguished from that of the parties, and in cases where there is a real and embarrassing conflict of opinion and authority between the Circuit Courts of Appeals."

Rule 19-1(b) of the Supreme Court Rules contemplates

> "The existence of a square conflict * * * the Court is interested in conflicts which impair uniformity of decision where uniformity is significant * * *."*

That these standards have not been changed is clear from *Rice* v. *Sioux City Memorial Park Cemetery, Inc., et al.*, 349 U. S. 70, 79, 75 S. Ct. 614, 619 (1955).

The wisdom of observing these standards is manifest in a legal system the growth and development of which is largely dependent upon careful case by case analysis. In such a system, the evolution of enduring and reasonable rules of law is generally fostered if the lower courts are given the opportunity to achieve a consensus or clearly articulate their reasons for disagreement.

These standards should be borne in mind in considering whether there is a conflict between the Courts of Appeals for the Seventh Circuit and the Sixth Circuit as alleged by Petitioners. Respondent here does not contend that the decision below is in perfect harmony with *Ocean Accident & Guarantee Corporation, Limited* v. *Felgemaker et al.*, 143 F.2d 950 (C.C.A. 6, 1944) *affirming, Felgemaker* v. *Ocean Accident & Guarantee Corporation, Limited, et al.*, 47 F. Supp. 660 (N.D. Ohio, E.D., 1942). These two cases, however, do not constitute a "real and embarrassing conflict" as required by the *Layne & Bowler* case, *supra*. On the

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* Frankfurter and Hart, "*The Business of the Supreme Court* at October Term, 1933," 48 *Harvard Law Review* 238, 268 (1934).

contrary, these cases are clearly and properly distinguishable on the facts and issues involved.

The two most obvious and significant distinctions between the Sixth and the Seventh Circuits' decisions are that the former did not present an issue of federal venue and that the jurisdictional question arose only after the judgment against the insured had remained unsatisfied for a period prescribed by the controlling statute of Ohio. In the latter case, by way of contrast, the question is whether the provisions of a federal venue statute (28 U.S.C. § 1400(b)) must be complied with, and this question is presented at the outset rather than after the termination of the civil action against one of Allbright-Nell's customers.

Thus *Ocean Accident & Guarantee Corporation, Limited* v. *Felgemaker et al.*, 143 F.2d 950 (C.C.A. 6, 1944) were damage actions arising out of an automobile accident in Ohio. The actions originally instituted in a state court were removed to the federal district court. The defendant's insurance company pursuant to its policy assumed the defense of the actions, but it was not named or treated as a party to the litigation. After the plaintiffs had won judgments against the insured, they sought satisfaction from the insurance company. They were entitled to proceed directly against the insurer under Section 9510-4 of the General Code of Ohio* and also under a clause of the insurance contract which provided

* "Upon the recovery of a final judgment against any firm, person or corporation by any person, including administrators and executors, for loss or damage on account of bodily injury or death, for loss or damage to tangible or intangible property of any person, firm, or corporation, for loss or damage on account of loss or damage to tangible or intangible property of any person, firm, or corporation, for loss or damage to a person on account of bodily injury to his wife, minor child or children if the defendant in such action was insured against loss or damage at the time when the rights of action arose, the judgment creditor or his successor in interest

> "'The Exchange, after rendition of final judgment against the Insured, shall be liable to the person entitled to recover for such death or for any such injury to the person or property when caused by the Insured, in the same manner and to the same extent that said Exchange is liable to the Insured.'" (143 F.2d 951)

In order to collect from the insurer the plaintiffs filed supplemental and amended complaints naming the insurer, but did not make proper service of summons on the latter. The insurance company admitted "it had no defense outside of the jurisdictional question," (143 F.2d at 953). The reports do not disclose that the insurance company objected specifically to venue in Ohio or that the facts would have justified such an objection since all plaintiffs apparently resided in Ohio. The question seems to have been whether the Court had acquired jurisdiction over the person of the insurance company without proper service of summons. In holding the insurance company as a party to the action on the judgment, the District Court and the Court of Appeals relied largely on Ohio and other state precedents (47 F. Supp. at 662, 143 F.2d at 952, 953). Indeed the District Court said that its holding was based on "the present state of the law of Ohio" (47 F. Supp. at 662).

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shall be entitled to have the insurance money provided for in the contract of insurance between the insurance company and the defendant applied to the satisfaction of the judgment, and if the judgment is not satisfied within thirty days after the date when it is rendered, the judgment creditor or his successor in interest, to reach and apply the insurance money to the satisfaction of the judgment, may file in the action in which said judgment was rendered, a supplemental petition wherein the insurer is made new party defendant in said action, and whereon service of summons upon the insurer shall be made and returned as in the commencement of an action at law. Thereafter the action shall proceed as to the insurer as in an original action at law." (Page's Ohio General Code Annotated, Volume Six, 1938.)

By contrast, the present case was not removed from a state court to a federal court, but was originally instituted in the District Court. The present case is for *patent infringement* which is a matter entirely free from the provisions of state laws as contrasted with an automobile accident case. The Allbright-Nell Company is not a commercial insurer but a manufacturer who, as a necessary incident to its sales, has given patent indemnity to its customers. Respondent's indemnity contract with Defendant Peter Eckrich and Sons, Inc. does not provide for direct liability of the indemnitor to the patent owners. Judgment of validity and infringement has not as yet been obtained against Peter Eckrich and Sons. If The Allbright-Nell Company were held liable to Petitioners, the amount of recovery would probably be determined in an accounting rather than by an award of a lump sum at the end of the trial.

Both the majority and the dissenting opinions below regarded at least some of these differences as significant. Thus, the majority opinion states (4-A, 5-A):

> "In *Ocean Accident & Guarantee Corp.* v. *Felgemaker*, 6 Cir., 143 F.2d 950, relied upon by plaintiffs, the service was quashed because the district court had 'no jurisdiction to issue process in this case beyond the limits of the district'. Although the court assumed jurisdiction on the ground of 'control of the defense' it does not appear a specific objection was interposed that the venue was inappropriate and the insurance carrier not subject to suit therein. In the instant case such an objection was timely made by Allbright-Nell's motion for dismissal on the ground that it was not subject to suit in the district. Nor is Allbright-Nell by its contract liable *to plaintiffs* by virtue of any judgment they may recover from Eckrich as was the case under the insurance contract involved in *Ocean Accident*. And in *Ocean Accident* the effect of

> the privy's conduct as authorizing entry of judgment against it was not determined until, as a past and completed occurrence, it was subject to judicial appraisal in the light of all factors involved. In the instant case we are importuned to accept a contractual obligation to defend and mere entrance thereupon as conclusive not only of one's ultimately being bound by the judgment entered but also of being, in the interim, subject to all of the incidents of being a formal party to the action."

Judge Platt apparently felt that the similarities between the instant case and the Sixth Circuit case were more important than their dissimilarities and he observed, incorrectly we submit (8-A, 9-A):

> "The *only* difference between the instant case and the *Ocean Accident* case is that judgment has not yet been obtained and may not be against Eckrich, whereas it had already been entered against the Inter Insurance Exchange's insured." (Emphasis added)

That the rendition of a final judgment against the insured is regarded as an indispensable requirement to an action against the insurer is clear from Section 9510-4 General Code of Ohio, as well as from pertinent cases. In *Maryland Casualty Co.* v. *Pacific Coal & Oil Co., et al.*, 111 F.2d 214, 215 (C.C.A. 6, 1940), this element was called a "jurisdictional prerequisite" and in *Builders & Mfrs. Mut. Casualty Co.* v. *Preferred Automobile Ins. Co.*, 118 F.2d 118, 121 (C.C.A. 6, 1941) the Court observed:

> "Appellant contends that it is the successor in interest of the Transfer Company in the original actions in the state court, and hence entitled to file the supplemental petition. This conte[illegible]on, however, ignores the fact that no judgment was e[illegible]red in those cases. Section 9510-4 requires the application of the proceeds of the insurance to the satisfaction of an existing judg-

ment, and is available only when a final judgment has been entered against the insured. Canen v. Kraft, 41 Ohio App. 120, 180 N.E. 277; State Automobile Mutual Ins. Co. v. Columbus Motor Express Co., 15 O.L.A. 747; Fire Ass'n of Philadelphia v. State Automobile Mutual Ins. Co., 29 O.L.A. 135. Appellant filed no supplemental petition in the action in the state court, and this fact also precludes it from securing relief as the successor in interest to the claims filed in the state court, for Section 9510-4 requires the filing of a supplemental petition in the action 'in which said judgment was rendered.'"

Viewed against the background of the Ohio statute and the pertinent prior decisions, the real holding of the *Ocean Accident* case is, at most, only vaguely related to the decision of which review is sought. The *Ocean Accident* case merely holds that under Section 9510-4 a supplemental action may be instituted against an insurer who had defended the insured in the principal action even though personal service cannot be made on the insurer. Thus the distinctions between the facts and issues in the *Ocean Accident* insurance case and this patent case are such that there is no real and embarrassing conflict for this Court to resolve. Moreover, the Court below in reaffirming the doctrine of *Freeman-Sweet Co. et al.* v. *Luminous Unit Co.*, 264 Fed. 107 (C.C.A. 7, 1919) lucidly articulated the policy grounds underlying its decision, and its opinion will probably prove to be persuasive to other courts who may be confronted with the same problem. Indeed a square holding practically identical with, though less articulate than, that of the Court below is found in *The Dow Chemical Company* v. *Metlon Corporation et al.*, 126 USPQ 158, 162 (C.A. 4, July 7, 1960).*

Petitioners also cite *Redman et al.* v. *Redman Manufacturing Company*, 181 F. Supp. 5 (M.D., N. C., 1960) in

* The case has not yet been officially reported.

support of their argument that this Court should review the decision below. The issue in that case differed greatly from the one here adjudicated in that it did not involve the question of whether a manufacturer assuming control of the defense of a patent infringement suit against one of its customers could be made a formal party to the record notwithstanding valid objections to venue and service of process. In the *Redman* case, the question was whether a final judgment enjoining the manufacturer from infringement could be enforced. The question was answered affirmatively because of several unique circumstances. In *Redman* a draft judgment containing the injunction had been submitted to the defense attorneys who had not objected thereto (pp. 7, 8). Indeed the defense attorneys submitted a draft judgment providing expressly that the manufacturer was "'bound by the Judgment herein'" (p. 8). The propriety of enjoining the manufacturer was not questioned until a petition for rehearing was filed in the Court of Appeals (p. 8). It is thus clear that the *Redman* case has little or no bearing on the issue of which Petitioners here seek review.

REASON No. 3

Petitioners' reason No. 3 is not persuasive. The alleged conflict between the decision below and the "recent liberal trend toward extending the scope of jurisdiction" is not a recognized ground for the exercise of this Court's discretionary jurisdiction. Moreover, the alleged conflict is pure fiction. Such cases as *Olberding et al.* v. *Illinois Cent. R. Co., Inc.*, 346 U.S. 338, 74 S. Ct. 83, 85 (1953), *Fourco Glass Company* v. *Transmirra Products Corporation, et al.*, 353 U.S. 222, 77 S. Ct. 787 (1957) and *Hoffman* v. *Blaski et al.*, ... U.S. ..., 80 S. Ct. 1084, 125 USPQ 553 (1960) all express or imply the necessity of complying with federal statutes pertaining to venue and jurisdiction. As stated in the *Olberding* case, 346 U.S. at 340, 74 S. Ct. at 85:

"The requirement of venue is specific and unambiguous; it is not one of those vague principles which, in the interest of some overriding policy, is to be given a 'liberal' construction."

CONCLUSION

For the foregoing reasons, it is respectfully submitted that the Petition should be denied.

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